In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ONE DISTILLERY ET ALIA AND HENRY WOLTERS, WILLIAM HELM, R. H. AUSTIN, AND J. H. COFFMAN, claimants of said One Distillery et alia. — No. 190.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The facts in the case, taken from the libel of information filed by the attorney for the United States and the answer and amended answer of claimants, are substantially as follows:

The Fruitvale Wine and Fruit Company was a corporation duly organized under the laws of the State of California, and as such corporation, under its corporate name, was the owner and operator of a distillery near Fresno, Cal., at which the business of brandy distilling was carried on in the months of July, August, September, October, November, and December, 1887.

W. More Young, a stockholder in the company, was the managing director of the same and also the active agent of the company in operating the said distillery during the said months.

On the 20th day of June, 1888, the distillery, distillery property, etc., were seized by the collector of internal revenue of the district as forfeited to the United States by reason of certain criminal violations of the internal-revenue laws of the United States committed in connection with the said distillery, its product and business, by the said Fruitvale Wine and Fruit Company, the owner thereof, whilst the same was operated under the charge and management of W. More Young, the secretary and managing agent of the company; the grounds of forfeiture being, in substance, that the said Fruitvale Wine and Fruit Company, a corporation, and a distiller of spirituous liquor from fruit, did commit, in the months of July, August, September, October, November, and December, 1887, certain frauds, concealments, removals, and other crimes in connection with said distillery and its product, whereby the United States was defrauded of the internal-revenue tax on the spirits produced at the said distillery.

(There were other formal seizures of the distillery and property subsequent to that of June 20, 1888, all of which were based on criminal offenses committed during the operations under the management of W. More Young in 1887, but it is not necessary to the legal propositions involved in the case to set them forth here specifically.)

W. Moré Young, the managing agent aforesaid, was indicted on the 20th of December, 1888, under section 3451 of the Revised Statutes, and was convicted on the

21st of February, 1889, upon the first count of said indictment and sentenced to imprisonment for a year in the county jail. The count upon which Young was convicted, omitting the formal parts, is as follows:

> That W. More Young, late of the southern district of California, heretofore, to wit, on the 5th day of September, in the year of our Lord one thousand eight hundred and eighty-seven, did falsely and fraudulently execute and sign a certain document required by the provisions of the internal-revenue laws and by a regulation made in pursuance thereof, to wit, a certain monthly return required to be made by distillers of grapes, which certain monthly return consisted of a report, signed and executed by said W. More Young, as secretary of the Fruitvale Wine and Fruit Company, a corporation engaged in the business of wine making and distilling, of the dates, the kind of material, the time of operation, and the amount of brandy distilled during the month of August, 1887, at the Fruitvale Wine and Fruit Company's distillery, near the town of Fresno, in the county of Fresno and State of California, in which monthly return the said W. More Young certified that no brandy had been distilled during said month at the said distillery, when in truth and in fact the said distillery was in operation during said month, distilling brandy, and the said W. More Young well knew that said distillery was in operation during said month, at the time that he falsely and fraudulently certified as aforesaid that no brandy had been distilled during the said month.

The amended libel of information against the property filed by the United States attorney, beginn'ng on page 10 of the record, alleges in substance:

First. That whilst the distillery was being operated

the company defrauded the United States, in the months of July, August, September, October, November, and December, 1887, of the tax on a large quantity of spirits distilled by the said company by the fraudulent removal of the said spirits from the distillery where the same had been distilled to a place other than a distillery, bonded, or designated warehouse or place of depository, without the tax on said distilled spirits, or any part thereof, being paid.

Second. That the said company, whilst carrying on the business of a distiller at their said distillery during said months, with intent to defraud the United States of tax on distilled spirits then and there made certain fraudulent and false entries in a book in relation to the operation of the distillery which was required by law to be kept, etc.

Third. That the company during the time knowingly and willfully and fraudulently omitted, neglected, and refused to do and cause to be done things required by law in carrying on and conducting said business; and

Fourth. That the said company did then and there willfully and fraudulently commit acts prohibited by the provisions of law in carrying on and conducting the business of distiller.

The claimants, Henry Wolters, William Helm, R. H. Austin, and J. H. Coffman, filed an answer, beginning on page 14 of the Record, in which they claim the property as purchasers of the same at a sale made by the assignee of the Fruitvale Wine and Fruit Company on the 9th of June, 1888. In this answer the said claimants make no specific denial of the causes of forfeiture set forth in the information, but aver that the criminal

acts upon which the forfeiture of the property is based were committed without the knowledge or consent of claimants or any of them.

The said claimants, Wolters, Helm, Austin, and Coffman, all of whom were stockholders in the Fruitvale Wine and Fruit Company whilst the distillery was being operated in 1887, by leave of court filed an amended answer (Record, p. 18), which is as follows:

> The said claimants aver that on or about the 20th day of December, 1888, an indictment was presented and filed in this court wherein and whereby one W. More Young was charged by the grand jury of the United States, then convened in said court, with having committed certain unlawful acts against the internal-revenue laws of the United States while the said Young was secretary of the Fruitvale Wine and Fruit Company, a corporation, a certified copy of said indictment being hereto annexed, marked "Exhibit A," and made a part hereof.
>
> That thereafter the said W. More Young was duly arraigned in this court and entered a plea of not guilty; that thereupon the said Young was tried for the offenses charged in said indictment before the court and a jury duly impaneled and sworn to try said Young, and a verdict was rendered by said jury in open court and duly recorded, whereby the said Young was found guilty by said jury upon one of the counts of said indictment, to wit, upon the "first count," and not guilty upon the other four charges or counts of said indictments, a certified copy of said verdict being hereto annexed, marked "Exhibit B," and made a part hereof; that thereupon on, to wit, the 21st day of February, 1889, judgment was pronounced in said court against said

Young, and he was sentenced to one year's imprisonment in the county jail of Fresno County, in execution thereof.

And claimants further aver that at all times mentioned in said indictment the said W. More Young was a stockholder, owning shares of the capital stock of said corporation and that said corporation, at the dates and times mentioned therein, was the owner of all of the real and personal property upon which and in connection with which the said distillery was situated and operated.

That it was by virtue of his position as secretary of said corporation that said Young was enabled to execute and sign the document mentioned in the first count of said indictment, and likewise to execute and sign the documents mentioned in the other four counts thereof; and it was only as an officer of said corporation that said Young could have executed and signed any or either of them.

And these claimants further aver that the whole of the capital and property of said corporation consisted of said distillery and distillery premises and winery, with its appurtenances, and that the capital stock in said corporation owned by said W. More Young at said times represented the interest and property which he then had and owned in said distillery, distillery premises, and winery.

And these claimants also aver that the distillery and distillery premises, winery, and real and personal property mentioned in the libel of information herein is the same distillery and distillery premises, winery, and real and personal property mentioned and referred to in said indictment against said Young. And the alleged fraud, concealments, and removal of distilled spirits, and the other alleged fraudulent acts contained in said libel of information, are the same

frauds, concealments, and removals of distilled spirits and other alleged fraudulent acts inquired of and investigated upon the trial of said W. More Young hereinabove mentioned, and in respect of which he was convicted and acquitted in manner aforesaid.

And these claimants further aver that all of the evidence which would be necessary to establish, and competent under the various assignments and charges of fraud set out in plaintiff's libel of information herein, was used and introduced upon the trial of said Young; and that the various charges of fraud and causes of forfeiture alleged by plaintiffs herein relate to the same subject-matter and are based on the same transactions as the various allegations in said indictment contained, and about which inquiry was made upon the trial of said Young; and that at the time when said bill of indictment was drawn by the then attorney for the United States and found by the grand jury, and at all of the times it was considered by said attorney for the United States, all of the facts which would be competent to sustain the allegation of plaintiff's libel of information were known to and within the possession of the said attorney of the United States.

And these claimants aver and say that the United States ought not to maintain its action herein for the penalty denounced by section 3451, and other sections of the Revised Statutes of the United States under which the said libel of information was drawn, for the said W. More Young was tried and convicted in this court in manner aforesaid as to one of the counts of said indictment and acquitted as to other counts, and the full sentence of the law and this court has been executed upon him for the same matters and things herein alleged in plaintiff's said libel of information; and that all and singular of

said matters upon said trial were tried and inquired into and fully heard, and on the hearing thereof the jury, duly impaneled and sworn, found said W. More Young guilty as to part and not guilty as to other of said charges.

And claimants further aver that at the time of the alleged commission of the acts for which a forfeiture is sought to be enforced in this action the said W. More Young was one of the owners of all of the property, real and personal, upon which a forfeiture could be decreed by this court, and that he ought not to be required to twice suffer for the same offense; and these claimants further aver in this behalf that it is only as stockholders in said corporation of which said W. More Young is and at all the times hereinabove mentioned was a member and stockholder that these claimants are sought to be charged with any notice of the alleged unlawful acts and doings of said corporation.

These claimants aver the foregoing in addition to their answer already on file herein, and expressly reply not only upon this, but upon all of the allegations and denials contained in said original answer. And having fully answered, they pray as they have heretofore prayed in said original answer.

The United States attorney demurred to the amended answer, and upon a question of law raised by this demurrer the district judge entered the following decree (Record, p. 25):

This cause came on regularly for trial before the court, sitting without a jury, a jury trial having been expressly waived in writing, the United States being represented by Willoughby Cole, esq., United States attorney, and the claimants by Messrs. Brousseau and Hatch, and Henry C. McPike, esq.

Whereupon the United States attorney announced to the court that the facts set forth in the amended and supplemental answer heretofore filed by the claimants in this action, and to which a demurrer had been interposed by the United States and overruled by the court, might be considered by the court and taken as true for the purposes of this trial, as if the said facts had been proved by competent witnesses, but that they were insufficient in law to constitute a defense to this action.

Thereupon the United States, by their said attorney, and the claimants by their attorneys aforesaid, submitted the cause to the court for its decision upon the pleadings in said cause, and the said amended and supplemental answer, the facts as to the matter, as already stated, being taken as true, the court, after considering the same, orders and decrees that the libel herein be, and the same is hereby, dismissed.

From this decree of the district court overruling the demurrer and dismissing the libel an appeal was taken by the United States to the circuit court for the ninth judicial circuit, the judgment of the district court was affirmed by the circuit court, and the case is in the Supreme Court by writ of error on behalf of the United States to the latter.

ARGUMENT.

I.

The claimants, Henry Wolters, William Helm, R. H. Austin, and J. H. Coffman, as will be seen by reference to the original answer filed by them (Record, p. 14, par. 1), alleged that they were owners of all the property, real and personal, described in the information, and based

their claim of ownership upon a purchase of the property made by them when the same was sold by the assignee of the Fruitvale Wine and Fruit Company on the 9th of June, 1888, the purchase price being $7,700.

In the amended answer, which contains the defense to the libel of information which was considered by the court below, there is no allegation of ownership on the part of the claimants, but the district judge, in his decision (Record, p. 29), considers the fact that the claimants filed the original answer and set up a claim to the property as purchasers at the said sale. He holds, however (Record, p. 32), that this claim can not be sustained, and he bases his decision in this respect upon the principle laid down in *United States* v. *Stowell* (133 U. S., 1).

The district judge then proceeds and in substance decides that these claimants, as stockholders in the Fruitvale Wine and Fruit Company, had a right to intervene as such to claim the property; also holds that to take the property from one stockholder is to take it from all (Record, p. 33); and, further, that the conviction and sentence of Young, also a stockholder in the company, is a bar to a decree of condemnation of the property as forfeited, on the ground that to take the property would punish Young twice for the same offense.

I agree with the district judge that these claimants derive no title, as against the Government, under any sale or change of ownership of the property made by the corporation or its agents after the acts upon which the forfeiture is based were committed.

It is a settled principle that the right of the Government to a guilty thing springs from an offense committed

in, with, or by it, and the title of the Government to forfeited property vests when the criminal act upon which the forfeiture is based takes place. The forfeiture dates back to the time the offense was committed, and operates at that time as a statutory transfer of the right of property to the Government. (*United States* v. *56 Barrels of Whiskey*, 1 Abb. U. S., 93, 4 Int. Rev. Record, 106; *United States* v. *One Cask, etc.*, ibid., 93; *Henderson's Distilled Spirits*, 14 Wall., 56.) In this last case it is held that where a forfeiture is made absolute by statute, the decree of condemnation, when entered, relates back to the time of the commission of the wrongful acts and takes date from the wrongful acts and not from the date of sentence or decree; that subsequent payment of duties upon subjects of taxation removed for the purpose of defrauding the Government is no defense to an information for forfeiture founded upon antecedent wrongful acts; that the effect of the wrongful acts, where the forfeiture is made absolute by statute, is to divest the owner of all property in the goods seized and to vest the title to said property in the United States.

This doctrine is reaffirmed in *United States* v. *Stowell* (133 U. S., 1), and Mr. Justice Gray, in delivering the opinion in that case, says:

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory

> transfer of the right to the United States at the time the offence is committed; and the condemnation, when obtained, relates back to that time, *and avoids all intermediate sales and alienations, even to purchasers in good faith.*

See also *McVeigh* v. *United States* (11 Wall., 259); *Day* v. *Micou* (18 Wall., 160).

So, then, the law is settled beyond all controversy that a subsequent purchase of this property or an ownership derived after the acts upon which the forfeiture is based were committed does not in any manner affect the title of the United States to the property.

It becomes important, therefore, in this case to determine whether or not these claimants, as mere shareholders in a corporation, could under the law intervene in the proceeding *in rem* for the condemnation of the property. In other words, were they owners or have they such an interest in the property as entitles them to assert it as claimants against a decree of condemnation? If they can claim at all, it is by virtue of the fact that they were stockholders in the corporation known as the Fruitvale Wine and Fruit Company.

In 15 Opin. Atty. Gen., 230 (reported in 23 Int. Rev. Rec., 141), it is held that a corporation may carry on the business of a distiller in its corporate capacity. Then the question is directly presented, whether—when a corporation engaged in the business of distilling, operated by its agent, commits a crime which works a forfeiture of its property—a part of the individual stockholders can intervene to claim the property of the corporation in the proceeding *in rem* instituted by the Government to condemn it?

"As a general rule, a corporation is to be regarded as a legal entity, separate and apart from the persons composing it." (7 Am. and Eng. Encycl. Law, 2d ed., 633.)

"The individuals composing these associations are united in one body and the *members lost* in the corporate existence. *It is not the individual members, but the legal being which acts and transacts business.*" *People* v. *Watertown*, 1 Hill (N. Y.), 616; (*Niagara County* v. *People*, 7 Hill (N. Y.), 504.)

In *Fietsam* v. *Hay* (122 Ill. 293) the court says:

> It will be kept in mind that the corporate body, for purposes of *ownership*, and, indeed, for most purposes, has a distinct identity from that of the individual corporators. The latter may be wealthy when at the same time the former is insolvent, and *vice versa*. The corporation has no right to appropriate, sell, or otherwise dispose of any of the property or effects of a corporator. The relation of debtor and creditor may subsist between them in the same manner as between the company and other persons. The company's entire property may be swept away from it by sequestration, or other means, and yet its franchises will remain vested in the corporators until they are either abandoned or forfeited to the State. All these propositions are familiar to the courts and the profession, and are well sustained by authority.

"*The corporators have no legal interest in the corporate property; it could not be levied on or taken by execution for the particular debt of the corporator.*" (7 Am. & Eng. Encycl. Law, 2d ed., 635.)

I wish to impress the point that the courts below necessarily treated the claimants as entitled to intervene, by

reason of the fact that they were stockholders in the corporation, and not because they were purchasers of the property after the forfeiture, or otherwise became entitled to it subsequent to the criminal acts of Young. That I am correct in this position will be observed upon an examination of the opinion of the district judge printed in the record, beginning on page 26. The judge, in discussing the right to the property which vested in the Government in 1887, says:

> When that right accrued, Young, as an owner of stock in that corporation, had an interest in every part and parcel of the property of the company. The Government had the right to proceed by civil action to enforce the forfeiture of the property because of the frauds, or to prosecute the parties engaged in it criminally; but for the same acts it could not do both. * * *

And further in the opinion, page 33, the judge says:

> To take the property in which he has an interest is to take his property; and for the same acts and omissions to punish him criminally, and also take his property is, for the same offences, to punish him twice.

Then says the district judge further (Rec., p. 33), in the conclusion of his opinion:

> The circumstance that Wolters, Helm, Austin, and Coffman have not been prosecuted for the fraudulent acts and omissions that are made the basis of the present action does not relieve the Government's case of the difficulty. *To take the property from one stockholder is to take it from all, and I can see no valid reason why the plea in bar of the action may not be interposed by anyone interested in the property.*

It will thus be seen that the district judge in this opinion based the right of claimants expressly upon the ground that they were stockholders in this corporation and had such a community of interest with Young that to forfeit their interest would also forfeit Young's interest, and vice versa.

I contend that the right of property, the ownership of property, which would give the right to make claim and defend in this case, belongs to the corporation called the Fruitvale Wine and Fruit Company, and that a private stockholder could not be heard to assert an interest in the tangible property of the corporation, or to defend it from the liabilities or obligations alleged to have been incurred by the corporation, until it should appear affirmatively that the legally constituted authorities of the corporation had refused or neglected to act.

The doctrine is definitely declared in *Van Allen* v. *The Assessors* (3 Wall., 573), in passing upon the ownership of the property of a national bank, that—

> The corporation is the legal owner of all the property of the bank, real and personal;

and in the case of *The Owensboro National Bank* v. *The City of Owensboro*, decided at the present term, the Van Allen Case is cited and the principle above stated reaffirmed.

None of these authorities are in conflict with the decision in *United States* v. *Wolters et al.* (46 Fed. Rep., 509), which is relied upon by the claimants, even if that decision is held to be the law by this court.

The liability of a stockholder in a corporation for the corporate obligations, under certain contingencies, does

not change the general doctrine that the corporation and not the individual shareholder is the legal owner of the tangible corporate property. And, further, the decision in the Wolters case is based upon a statute of the United States, which declares that—

> Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or other distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom.

The suit against Wolters and others was for taxes, and the court held that as shareholders in a corporation they did have an interest in the distillery and property such as to make them liable for taxes under that statute; but the court did not hold that these shareholders had any legal ownership of the property such as would entitle them, or any one of them, to assert it in a legal proceeding in which the title to the property was at issue. I call the attention of the court to the fact that the defendants in that case, Wolters et al., being the identical persons who are claimants in this case, set up the defense that stockholders are neither proprietors nor possessors of the corporate property and insist upon the very proposition which I contend for here.

I submit, therefore, that these four individual holders of certificates of stock in the corporation known as the Fruitvale Wine and Fruit Company have no such interest in the tangible property of the corporation as would entitle them to intervene as claimants and defend the property in this case, and the same principle applies to Young as a stockholder in the corporation.

II.

Still, a further view of the case to be considered in connection with the right to claim and defend property is that Young does not appear as a claimant at all. He does not undertake to assert any interest whatever in the property, and, so far as can be gathered from the record, he is entirely content that whatever right he may have had in the property be forfeited. Wolters, Helm, Austin, and Coffman are seeking to save the property to themselves on the ground that to condemn the same takes it from Young and thus inflicts upon him an unauthorized punishment, when, in fact, Young himself sets up no such contention.

In *Semmes, plaintiff in error*, v. *United States* (91 U. S., 21–25), the court, according to my understanding, settles the principle that the owner of property proceeded against by libel of information is remediless, unless he avails himself of the opportunity to make his claim and defend his right as against the Government. He will not be permitted to stand silent and obtain the same relief as he might be entitled to if he availed himself of the remedy provided by law—that is, to come into court and defend the property by asserting his claim and setting up his title and interest in the property. And in the Semmes Case the court also decides that where a libel of information alleged the property proceeded against to belong to one person, when, in fact, a part of it belonged to others, the decree of condemnation will carry with it the interest and title of all persons whatsoever, for the

proceeding is against the *res* and not against the owner or owners.

If, therefore, the failure of Young to come in and by his formal pleading in the proceeding *in rem* assert his claim and defend his interest in the property entitles the Government to a decree of condemnation as to this interest, then the whole fabric of the district judge's decision (which was affirmed by the circuit court) falls; for this decision is placed expressly on the ground that Young's ownership of stock in the corporation gave him "an interest in every part and parcel of the property of the company."

I refer the court in this connection to the fact, further, that Wolters, Helm, Austin, and Coffman were never prosecuted criminally and therefore there can be no suggestion that to forfeit the property is punishing them twice for the same offense, though they were shareholders in the corporation at the time that it, through its agent, committed the criminal acts upon which forfeiture is based.

III.

That the property was forfeited to the Government and the title thereto transferred by the criminal acts of the agent, Young, and at the time the said acts were committed, can not be disputed. I have already cited authority to the effect that a corporation can carry on the business of a distiller of spirituous liquors. The corporation must necessarily act by an agent. Young was the agent of this corporation to operate the distillery. The acts of the agent are imputed to the principal so far

as they work a forfeiture of property used for unlawful purposes. (*Bush* v. *United States*, 31 Int. Rev. Rec., 305; *United States* v. *Buchanan*, 28 Int. Rev. Rec., 51.) And if Young was in possession of this distillery and operating it with the assent of the owner, under the rule laid down in the case of *Dobbins' Distillery* v. *United States* (96 U. S., 395), the commission of unlawful acts by Young which worked a forfeiture in connection with the distillery would forfeit the property, although such acts were unknown to the owner.

In Dobbins' case the distillery was being operated by a lessee, who neglected and refused to keep certain books required by law and to make the required entries in the same; who also made false entries in the distillery books and omitted to enter in said books the facts required by law with intent to defraud the revenue and to conceal from the revenue officers facts and particulars required to be stated, etc. The distillery and property connected with it were seized and a libel of information filed. The owner and lessor of the distillery appeared and made the defense, in substance, that he had no knowledge of the criminal acts of the lessee; that he was no party to the same, etc.; and Mr. Justice Clifford, in delivering the opinion of the court in this case, says:

> Nothing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be used and occupied by the lessee as a distillery.

And he says further:

> Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those entrusted with its possession, care, and custody, even when the owner is otherwise without fault.

And Waples, in his "Proceedings in rem," under the head of "Forfeiture of land as a guilty thing," says:

> Lands are forfeited when used in contravention of law. The violation of law by the use of land is in some instances, by the owner, but not necessarily so. It is not the owner's guilt, but the land's guilt, by its use, that renders it forfeit. There is an offending person and an offending thing, but the proceedings are against the latter.

In the case we are considering the facts present the grounds of forfeiture more strongly than in Dobbins's case. In the latter the owner of the distillery permitted it to be operated by a lessee, and his criminal acts, without the knowledge or consent of the owner, were held to forfeit the property, whilst in our case the owner, a corporation, was itself operating the distillery by its duly authorized agent, and he committed criminal violations of law which work a forfeiture.

IV.

Having discussed these views of the questions, which I think arise, I come now to the principal point involved, being the one upon which the court below dismissed the libel of information. This question arises upon the contention of the claimants, and the decision of the district court (which was affirmed by the circuit court) that

Young, as a stockholder in the corporation called the Fruitvale Wine and Fruit Company, had an interest in the property of the company, which interest must be treated in this proceeding as an ownership of the entire property; and that to proceed to condemn the property by decree of forfeiture, and thus divest Young of said interest and ownership, after his conviction and sentence in the criminal indictment, for the acts upon which the forfeiture is based, would twice punish him for the same offense. The court below gives the decision in the case of *The United States* v. *McKee* (4 Dillon, 128), as grounds for the decision in this case. I submit, should it be held that the principle decided in McKee's Case is sound law, that the two cases are not at all similar. McKee had been indicted, convicted, and punished under section 5440 of the Revised Statutes. A civil action was subsequently brought against him under section 3296 of the Revised Statutes to recover the penalty of double the amount of taxes on distilled spirits, out of which it was alleged the Government had been defrauded by means of a conspiracy entered into for that purpose by the defendant and certain distillers for the unlawful removal by them of the said spirits without the payment of the taxes. In the civil action the defendant pleaded in bar his conviction and punishment, alleging that it was for the same acts as those for which a penalty was sought to be recovered; and the court held that if the specific acts of removal upon which the civil suit was based were the same as proved in the indictment, then the former judgment was a bar to a recovery in the civil action. In other words, that, McKee having been convicted and

punished for conspiracy under section 5440, it would twice put him in jeopardy if a part of the punishment prescribed for the offense of removal and concealment of distilled spirits, as provided in section 3296, was visited upon him.

In the case at bar Young was convicted of a violation of section 3451 of the Revised Statutes, which reads as follows:

> Every person who simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal-revenue laws, or by any regulation made in pursuance thereof, or who procures the same to be falsely or fraudulently executed, or who advises, aids in, or connives at such execution thereof, shall be imprisoned for a term of not less than one year nor more than five years; and the property to which such false or fraudulent instrument relates shall be forfeited.

It will be seen that under this section the measure of punishment is imprisonment and the forfeiture of the property.

A question almost precisely similar to the one in the case under consideration is found exhaustively discussed by Mr. Justice Blatchford, at circuit, *in re Samuel H. Leszynsky*, reported in 16 Blatchford, 9. There the relator, Leszynsky, was sued by the United States in a civil action for a penalty imposed under section 3318 of the Revised Statutes, which reads as follows:

> Every rectifier and wholesale liquor dealer shall provide a book, to be prepared and kept in such form as may be prescribed by the Commissioner of

> Internal Revenue, and shall, on the same day on which he receives any foreign or domestic spirits, and before he draws off any part thereof, or adds water or anything thereto, or in any respects alters the same, enter in such book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence the spirits were received, * * * and whenever any rectifier or wholesale liquor dealer refuses or neglects to provide such book or to make entries therein as aforesaid * * * he shall pay a penalty of one hundred dollars, and shall (on conviction) be fined not less than one hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years.

Leszynsky, in the civil action, confessed judgment for the amount sued for, and the same was thereafter paid, together with the costs, and the judgment satisfied. After the judgment was thus satisfied Leszynsky was charged before a United States commissioner with the criminal violation of the said section and arrested upon a warrant in the hands of the United States marshal. At the hearing before the commissioner Leszynsky was held for trial and committed to the custody of the marshal. Upon application for writ of habeas corpus, in which the relator set up that in consequence of the proceedings in the civil action he was not liable to be again arrested, held, detained, tried, convicted, or punished for the same cause, and that an arrest and detention under said warrant was for the same cause for which he was punished by the payment of said judgment, Justice Blatchford held that

the plea was bad, and the application was denied. In the opinion the learned justice says:

> It is to be noted that section 3318 provides distinctly that whenever any rectifier or wholesale liquor dealer does what is specified therein he shall pay a penalty of $100, and shall, on conviction, be fined and imprisoned. No more distinct form or construction could have been adopted to indicate the intention of Congress to provide cumulative penalties or punishments, three in number, each in addition to the other two—a penalty of $100 to be recovered by a civil action, and fine and imprisonment to follow conviction on a criminal prosecution. But, in the eye of the law, the three punishments are only one punishment for the same offense, although the penalty of $100 may be recovered in a civil action and the fine and imprisonment are inflicted by a criminal prosecution. The statute book has many like provisions for punishment of offenses where a penalty to be recovered by a civil action is given and a fine and imprisonment, or one of them, on a criminal conviction, is prescribed in addition and cumulatively, by the use of the word "and." Provisions for punishment by the forfeiture of property, which must be enforced in a civil action, and, cumulatively and in addition, by fine and imprisonment, or one of them, on a criminal conviction for the same offense for which the forfeiture of property is prescribed, are of the same character. Where the same section of the statute contained the description of the offense, and the prescription of the penalty by civil suit, and of the punishment on a criminal conviction, the two connected by the copulative "and," no other construction is proper than that the whole is one punishment, and that the whole can not be satisfied by a part. Reference, for pro-

visions of the above descriptions, in the same title in which section 3318 is found, may be had to sections 3257, 3258, 3259, 3260, 3279, 3292, 3296, 3326, 3340, 3342, 3360, 3370, 3380, and 3401. Penalties and forfeitures given by statute are to be enforced by civil suits. Fine and imprisonment are to be inflicted as the result of a conviction on a criminal prosecution. Different methods are to be resorted to to enforce the different parts of what is one and the same punishment, but the fact that the two methods may be progressing simultaneously and one be completed before the other, or that one may be fully completed before the other is commenced, can not have the effect to annul the provision of law in regard to the uncompleted part.

If the indictment and conviction of McKee had been under section 3296 instead of 5440, then, according to the principle of law decided in the Leszynsky Case, the Government could have recovered the penalty in double the amount of the tax imposed upon the distilled spirits which McKee was shown to have removed or concealed without payment of the tax; this being a part of the punishment prescribed by that section. Many statutes of the United States can be found, both under the internal-revenue laws and the customs laws, in which criminal violations are punished by fines or imprisonment, or both, inflicted upon the offending person, and the forfeiture of the offending property.

In *Boyd, claimant*, v. *United States* (116 U. S., 616,) the doctrine which is here contended for on behalf of the Government is upheld. The case was a proceeding *in rem* to forfeit certain goods under the twelfth section of

the act of June 22, 1874. That act provided that certain acts or fraud committed against the public revenue in relation to imported merchandise should be criminal, and that the offender should be fined not exceeding $5,000, nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise should be forfeited. Mr. Justice Bradley, in delivering the opinion of the court, says:

> These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If the indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment.

It being thus expressly declared that the forfeiture provided in the act constituting the criminal offense for which the offending person is liable to punishment follows the conviction of such person.

In *Coffey* v. *United States* (116 U. S., 436) it is held that an acquittal of the offending person is a bar to a proceeding in rem for the condemnation of property in connection with which the criminal acts were committed, and this upon the ground that—

> where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*.

The reason and soundness of this principle are readily seen, because in the issue between the United States and the person charged with the commission of the acts which are the basis of forfeiture it is determined that the acts were not committed, and the facts did not exist. Consequently there was no forfeiture, because the acts must have been committed and the facts must have existed at the time in order to vest the title of the offending thing in the Government as forfeited property. The case here is directly the converse of the Coffey case, because in the trial upon the indictment the issue was found against Young, the offending person, and it was ascertained by such finding that the criminal acts were committed by Young, and the facts did exist, which forfeited the property to the United States. And, in the opinion in the Coffey case, the Supreme Court substantially sustains this view when it says (p. 443):

> Whether a conviction on an indictment under section 3257 could be availed of as conclusive evidence in law for a condemnation in a subsequent suit in rem under that section, and whether a judgment of forfeiture in a suit *in rem* under it would be conclusive evidence, in law, for a conviction on a subsequent indictment under it, are questions not now presented.

Can anyone read this quotation from the opinion and say that the court entertained any other view than that a proceeding *in rem* for the forfeiture of property, declared by law, would follow the conviction of the person upon whose criminal act the forfeiture was based, and *vice versa?* In other words, that the fact that the offending

person had been convicted was not a bar to the proceeding *in rem* against the offending thing, the only question being whether the conviction and judgment of the offending person could be availed of as conclusive evidence in the proceeding against the property; and whether, if the proceeding *in rem* had been instituted and concluded by a decree of condemnation, that judgment was available as conclusive evidence upon a subsequent trial of an indictment against the offending person.

Finally, there is no doubt about the proposition that if the Fruitvale Wine and Fruit Company, by Young, its authorized agent, committed the criminal acts charged as alleged in the libel of information, then this distillery, property, etc., were at the time of the commission of the said acts forfeited to the United States and the title to the same became vested in the United States. It has been ascertained by the verdict of a jury upon the issue raised between the United States and Young in a criminal indictment charging him with these acts that in the month of August, 1887, he did commit the acts. The distillery, etc., therefore, were in the said month of August, 1887, forfeited to the United States and the title thereof became vested in the United States. Then, what has occurred since to divest the Government of its title? It is well settled that the sale made by the assignee under the assignment of the Fruitvale Wine and Fruit Company on the 9th of June, 1888, at which these claimants purchased, did not affect the right of the Government, and it is equally well settled that the subsequent payment of taxes assessed upon the distilled spirits unlawfully removed could in no wise impair the property

of the Government in the offending thing. This leaves the sole proposition that the conviction and punishment of Young is a bar to the decree of condemnation in the proceeding *in rem*, and it was upon this ground that the courts below overruled the demurrer of the United States to the amended answer of claimants and dismissed the libel of information.

I insist that this action of the lower courts was erroneous and should be reversed.

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